February 20, 2014

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of NorthWestern Energy for Hydro Assets Purchase	)))	REGULATORY DIVISION DOCKET NO. D2013.12.85

STATEMENT OF DISSENT OF COMMISSIONER KOOPMAN TO NOTICE OF COMMISSION ACTION

The Commission's decision to sustain Northwestern Energy's (NorthWestern) objections to certain data requests received my full support. But in those instances where objections were based on Rule 34 of the Rules of Civil Procedure, it is this Commissioner's opinion that the Commission embarked upon dangerous precedent, that may be laying a foundation for unjustified limitations on our primary discovery process (data requests), which in turn would constrict the free flow of information vital to our defense of the public interest.

While we must fully acknowledge NorthWestern's right to freely object to data requests on whatever grounds they wish to assert, the plethora of objections to our reasonable requests for new analysis of information under their control, using software in their possession, was in my judgment misplaced. Many of these requests supported critical areas of our eventual deliberation, as the Commission determines, among other things, (a) the likely impact of the hydro acquisitions on consumers' future power bills, and (b) the degree to which Northwestern fully and reasonably explored all acquisition and procurement alternatives, to arrive at the most economically beneficial transaction.

For the Commission to essentially handcuff its ability to get at this information hampers the performance of our public duties, undercuts the historic practices of the Commission and undermines the incentive of both Northwestern and all future pre-approval applicants to voluntarily provide any data that may henceforth be objected to as

"new information" or "new analysis." This is not the road we want to travel down nor the message we want to send.

While I am keenly sensitive to my fellow Commissioners' desires to protect the process and work within the letter of the law, I believe their expressions of concern in this instance are misguided, and based on a common misunderstanding about the unique roles, functions and procedures of State Public Service Commissions. While, in the context of ARM 38.3.3301, we have indeed adopted certain provisions of the Rules of Civil Procedure, it becomes a tortured logic to conclude that the Commission functions in all ways like a civil court, and that pre-hearing data requests should be treated in exactly the same manner as interrogatories in a state civil action, per Rule 34.

Civil actions in a district court involve contested cases between two parties, seeking to make someone "whole." They are by their nature adversarial. Moreover, civil actions take a backwards look. They are based entirely of past events. This is precisely why the Rules of Civil Procedure preclude the use of depositions and interrogatories to require the production of "new" information. Such a requirement would make no sense. The events have already taken place, and it is up to the contesting parties to make their best cases, based on those historic events.

In contrast, the pre-approval process of the Commission is primarily forward looking, and involves a great many projections and forecasting of the future. This is exactly why our own rules draw such a clear distinction between differing techniques of discovery. Without the tool of data requests, we would be hard put to do our jobs as Commissioners, in the public interest. Notably, our rule governing data requests, 38.2.3301(2) does not disallow requests for reasonable and non-burdensome new analysis. It states:

> *(2) Nothing in (1) of this rule shall be construed to limit the free use of data requests among the parties. The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the commission.*

Clearly, a Commission's data request process, by its very nature, is quite different that an interrogatory process. That's why no limit is placed on the number of data requests that can be made, whereas interrogatories in a civil action are limited to a maximum of 50. Furthermore, Commissioners – unlike judges in a courtroom – act in

the role of investigators. Rule 38.2.302 states, in part, that *"The proceedings before the commission are investigatory on the part of the commission…"* No judge in a civil suit has investigative powers. The contesting parties present their cases, and that is all the information that enters the record. The fundamental reason for this difference is that, in civil actions, it is adversarial, and the decision affects only the parties in that case. No overarching "public interest" is at stake.

Where the Public Service Commission is concerned, protection of the public interest (i.e., everyone) looms in all of our proceedings as our primary goal. This, in turn requires a robust investigatory approach to our work, making clear that the Rules of Civil Procedure must flex to these critical, statutorily required functions of the Commission. The primary method of Commission discovery to accomplish this is the unique and necessarily less restrictive process of data requests. As our rule makes abundantly clear, this process must be applied judiciously, yet at times, aggressively, to enhance rather than restrict the free flow of vital information in the public interest.

Unfortunately, the Commission, in this action, veered off course, ignored decades of effective practice and precedent, and lost sight of that critical goal.

For the foregoing reasons, I respectfully DISSENT

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Roger Koopman, Commissioner (dissenting)